IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1487

GARY WOODY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

AUTHORITIES

AUTHORITIES (Continued)

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on February 17, 1978, affirming Petitioner's conviction and vacating and remanding the judgment of the United States District Court for the Southern District of Texas for resentencing.

OPINION BELOW

The opinion of the Court of Appeals of which review is sought is printed in Appendix A hereto, infra, page 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1978, and is printed in Appendix B, infra, page 24a. The order of the Court of Appeals denying the Petition for Rehearing was entered on March 20, 1978, and is printed in Appendix C, infra, page 25a. The order of the Court of Appeals granting a stay of the issuance of the mandate pending petition for a writ of certiorari is printed in Appendix D hereto, infra, page 27a.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

(1) Was Petitioner's Fourth Amendment right violated where sole basis of search of his vehicle was detection of odor of marijuana by officer who indicated that wind direction and whether or not contraband was tightly wrapped or sealed (as in the instant case) had no effect on his ability to detect such odor?

(2) Was improper weight given by trial judge to testimony of officer's sense of smell, which alone, afforded basis for probable cause to search Petitioner's automobile?

(3) Did flight from border patrol check point afford probable cause to search vehicle after driver's citizenship had been established and officer had already directed driver to open trunk?

(4) Does Court of Appeals opinion authorizing trial judge to withhold summary of facts on which conclusions are based in presentence report as long as judge documents reasons for confidentiality to Court of Appeals, contravene provisions of Rule 32(c)(3)(B), Federal Rules of Criminal Procedure, which permit no such discretion?

(5) Does trial court have discretion under Rule 32(c)(3)(B), F.R.C.P., to withhold a "factual" summary of confidential information from Petitioner relied on in presentence report for sentencing?

(6) Does discretion of court as suggested by opinion of Court of Appeals to refuse to provide summary of facts relied on in confidential portion of presentence report for sentencing deprive Petitioner of opportunity to offer matters in mitigation of punishment and to make a meaningful response at re-sentencing hearing?

(7) Do matters raised in questions (4), (5), and (6), hereinabove concern issues of due process of law in this case of first impression that have not been, but ought to be, settled by the Supreme Court under Rule 19, Supreme Court Rules?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions involved are those parts of the Fourth and Fifth Amendments to the United States Constitution which provide that (1) "The right of the people to be secure in their persons, . . . and

effects, against unreasonable searches and seizures, shall not be violated, . . ." and (2) "nor shall any person be . . . deprived of . . . liberty . . . without due process of law . . .".

The statutes involved are 42 U.S.C., Sec. 841, and 28 U.S.C., Sec. 2106, the pertinent texts of which read, respectively, as follows:

> "841. *Prohibited Acts A — Penalties*
>
> "(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .
>
> "(b) Except as otherwise provided in section 405 [21 USCS § 845], any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1) (A) . . .
>
> (B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than

> $15,000, or both . . . Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment . . .".

> "2106. *Determination*
>
> "The Supreme Court, or any other court of appellate jurisdiction may affirm, *modify*, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and *direct the entry of such appropriate judgment*, decree, or order, *or require such further proceedings to be had as may be just under the circumstances.*"*

Procedural rules involved are Rule 19, Supreme Court Rules, and Rule 32, Federal Rules of Criminal Procedure, the pertinent parts of which read, respectively, as follows:

> "Rule 19. *Considerations Governing Review on Certiorari*
>
> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* Emphasis added unless otherwise indicated.

"(b) Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; . . ."

"Rule 32. *Sentence and Judgment* — (a) *Sentence.* (1) *Imposition of Sentence.*

". . . Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and *to present any information in mitigation of punishment* . . .

"(c) *Presentence Investigation* . . .

"(3) *Disclosure.* (A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

"(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, *the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon.* The statement may be made to the parties in camera."

STATEMENT

In a trial before the United States District Court for the Southern District of Texas without a jury, Petitioner, Gary Woody, was convicted of possession with intent to distribute approximately two hundred fifty (250) pounds of marijuana. The court sentenced Petitioner to four years' imprisonment and a special parole term of three years on March 8, 1977. Petitioner duly perfected an appeal from the judgment entered on March 8, 1977, to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals opinion printed herein as Appendix A, infra, affirmed Woody's conviction; however, his sentence was vacated and remanded for further proceedings before the trial court.[1] Woody's petition for rehearing of the affir-

1 567 F.2d 1353 (5 Cir. 1978). Petitioner's case was combined by the Court of Appeals in its opinion with No. 77-5292, *United States* v. *Savant*, because of the common issue of whether the summary of undisclosed information contained in a presentence investigation report provided to the defendant was sufficient; however, the *Savant* appeal involved only the sentencing issue and not the correctness of that defendant's judgment of conviction. (Appendix A, infra).

mance of his conviction was denied on March 20, 1978, without written opinion, and the issuance of the mandate stayed by the Court of Appeals until April 19, 1978, pending the filing of a petition for certiorari with this Honorable Court.

The proceedings below resulted from Petitioner's indictment in the Southern District of Texas for possession with intent to distribute approximately 250 pounds of marijuana in violation of 42 U.S.C., Sec. 841(a)(1). The facts on which the indictment was based reflect that Petitioner was alone in an automobile when he stopped at the permanent border patrol check point a few miles south of Falfurrias, Texas, on December 8, 1975. The border patrol officer, after being satisfied that Petitioner was an American citizen, testified that he detected the odor of marijuana emanating from the vehicle and asked Petitioner to open the trunk. (R. 6, 12, 13, 17) At this point, the Petitioner sped away from the check point, was pursued and was subsequently apprehended by the officer. After taking Petitioner into custody, the officer discovered kilo bricks of marijuana *wrapped in brown paper in the trunk of the car.* (R. 6, 7, 18) On cross-examination, the officer indicated that wind direction and whether or not marijuana was wrapped or sealed had *no effect on his ability to detect its odor.* (R. 15, 16, 18) .

Petitioner's motions to strike the testimony of the border patrol agent and to suppress evidence were denied by the trial court. (R. 21, 56) The question of lack of probable cause was urged in the Court of Appeals un-

der Petitioner's first issue contained in his brief filed in that Court.[2]

At the sentencing proceeding, Petitioner's counsel made a timely request to see a portion of the presentence report classified as confidential and summarized generally as relating to the Defendant's reputation in his community and among law enforcement officers there, and to his past and present employment. The facts which allegedly supported the reference to his reputation which were not disclosed to counsel were purportedly justified by merely tracking the language of Rule 32(c)(3)(A), F.R.C.P.

REASONS WHY THE WRIT SHOULD BE GRANTED
(Under Questions 1, 2, and 3)

Rule 705, Federal Rules of Evidence, provides that "the expert may in any event be required to disclose the underlying facts or data on cross-examination" supporting his opinion. The opinion of the Court of Appeals misapprehended the basis of Petitioner's challenge to the probative effect given by the trial judge to the opinion testimony of Agent Walton on the issue of probable cause. Since the officer's sense of smell in allegedly detecting the odor of marijuana was the sole basis for justifying a warrantless search, the questions presented on the probable cause issue amount to more than mere evidentiary ones, but

2 Issue No. 1 presented in Petitioner's brief in the Court of Appeals reads as follows:

> "1. Did mere conclusion of Border Patrolman, unsupported by factual basis for his opinion or by other facts and circumstances, that odor emanating from vehicle was of marijuana, afford probable cause to search trunk of vehicle?"

rather, take on constitutional dimension. This is because in all drug cases such as this, bare possession of a drug (referred to as a "controlled substance" in 42 U.S.C., Sec. 841) is all that is necessary to complete the crime. Consequently, other than proof that the substance possessed is in fact the contraband alleged in an indictment, the prosecution need only introduce facts underlying the probable cause supporting the arrest of the suspected possessor.

Petitioner submits that the officer's answers on cross-examination, inferring that wind direction and whether or not the substance is tightly sealed or wrapped did not affect his ability to detect the odor of marijuana, contradict common sense and knowledge and undermine any weight and general reliability his testimony might have otherwise been entitled to. Contrary to what the Government contended, the trial judge has failed to apply the lessons of common, ordinary experience in accepting the agent's uncorroborated testimony in supporting probable cause to search Woody's vehicle.

The legal proposition that the sense of smell is a legitimate manner of obtaining information from which to testify is well settled. Petitioner's complaint is that in the instant case, such testimony was accorded undue weight without the safeguard of legal rules, i.e., the lesson of common, ordinary human experience, particularly in light of the incredible statements of the officer on cross-examination with respect to his invulnerable sense of smell. The opinion of the Court of Appeals, Appendix A, infra, cites *United States* v. *Arrasmith*, 557 F.2d 1093 (5 Cir. 1977)

as laying to rest the issue now before the Supreme Court on probable cause based on the detection of the odor of marijuana.[3] That case is distinguishable because Petitioner's complaint is not merely the agent's failure to describe the odor, but as stated hereinbefore, his statements which defy the reality of human capability. Moreover, since the Court of Appeals has forbidden in-court experiments with other substances,[4] and contraband is not readily available to the defendant to counter the government witnesses, the discretion of the judge in scrutinizing such uncorroborated evidence is all the more important.

The only comparable cases other than those affirming marijuana convictions uncovered in researching evidence of probable cause afforded only by sense of smell are the old whiskey cases from the prohibition era. Some convictions have been reversed where opinion testimony based on odor of whiskey was held to be insufficient to entitle the trier of fact to rely on it as probative evidence. *Anderson* v. *State*, 103 So. 305 (Ala. App. 1925), *Matthews* v. *State*, 106 So. 390 (Ala. App. 1925), *Powell* v. *State*, 105 So. 429 (Ala. App. 1925).

Because proof of probable cause is tantamount to proof of guilt, the trial judge should have before him clear and convincing facts to support the admissibility of evidence perceived solely by a witness's uncorroborated sense of smell. Accordingly, it is con-

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3 In *Arrasmith*, supra, it is interesting to note that the legality of the search was not attacked on appeal.

4 *United States* v. *Torres*, 537 F.2d 1299 (5 Cir. 1976).

tended that the trial judge abused his discretion in denying Petitioner's timely motions to strike and to suppress evidence.

The Court of Appeals in citing *United States* v. *Dimas*, 537 F.2d 1301 (5 Cir. 1976), cert. den. 429 U.S. 1047, 97 S.Ct. 755, in view of Petitioner's flight from the check point, as supporting a possible additional ground for probable cause to search the car, misapprehends the point at which a search may, under these circumstances, be deemed to have begun.[5]

It was after the border patrolman had satisfied himself that Woody was an American citizen and directed him to get out of the car and open the trunk that the flight in the instant case occurred. The facts here are analogous to those in *United States* v. *Newman*, 490 F.2d 963 (10 Cir. 1974). In *Newman*, the search was held to have begun when the officer himself proceeded to the rear of the suspect's vehicle. There is no difference whether the officer himself moved toward the rear of the vehicle, as in *Newman*, or whether he directed the driver to open the trunk. It amounts to the same thing, the search has begun.

Accordingly, Petitioner submits that the Court of Appeals has misapplied the law and that its reliance on *Dimas*, supra, as back-up support for probable cause to search Petitioner's vehicle is ill-placed, and only encourages bootstrap efforts to justify searches at automobile checkpoints by immigration officers.

5 In *Dimas*, supra, the defendant literally "crashed the gate", having sped through the checkpoint at 60 miles per hour in the first instance, hence the facts there bear no similarity to those in the case at bar.

For the foregoing reasons, Petitioner submits the search of his vehicle was without probable cause and violated his constitutional right guaranteed by the Fourth Amendment.

REASONS WHY THE WRIT SHOULD BE GRANTED
(Under Questions 4, 5, 6, and 7)

Although the Court of Appeals has granted the alternative relief requested by Petitioner, vacation of his sentence and remand for resentencing, it has included in its opinion some unauthorized guidelines which the appellate court suggests be followed by the trial court.[6] This is in connection with the alternative to "summary of factual information" in the confidential portion of the presentence report on which the court relies for sentencing. (Appendix A, infra) *Woody*, supra.[7] The Court of Appeals has agreed, on the one hand, that the summary of factual information provided to defense counsel was insufficient and, on the other hand, has sanctioned continuing non-disclosure of the facts contained in the confidential sections of the presentence report by suggesting to the trial judge that he may seal his reasons along with such confidential portions for review only by the Court of Appeals to determine the propriety of declining further disclosure. The Court of Appeals is concurring with

6 Issue No. 3 presented in Petitioner's brief in the Court of Appeals reads as follows:

> "3. Did failure of Court to summarize orally or in writing confidential portions of pre-sentence report relied on in sentencing deprive Appellant of opportunity to explain, comment on, or challenge such factual information?"

7 567 F.2d 1353, 1362, 1363.

Petitioner that the factual information (actually conclusions unsupported by facts) which was supplied to counsel was totally deficient and did not meet the minimum requirements of Rule 32(c)(3)(B) is, at the same time, unwilling to afford Petitioner the full benefit of the amendment to Rule 32 making disclosure of the information in the presentence report mandatory.

The participation of the defendant in the sentencing stage of the criminal proceedings has been the object of much study and controversy over the years. Rule 32(c)(3)(B), F.R.C.P., was included in the amendment adopted by the Supreme Court in 1974, approved by Congress, and became effective in 1975. The history of Rule 32 with respect to the sentencing stage has been an on-going effort to allow the offender to participate in the disposition of his case.

The underlying reason for this amendment is easy to understand. Because in most cases the accused is more interested in what disposition is made of him rather than a determination of his guilt or innocence, no wonder so much attention has been focused on the sentencing stage of the proceedings. It is the reluctance to lay down inflexible rules with respect to this stage of the proceeding, as pointed out in the opinion of the Court of Appeals, that has brought about such great disparity of sentencing and so much suspicion about the fundamental fairness of sentencing in the federal judiciary. Accordingly, Rule 32(c)(3)(B), as promulgated by the Supreme Court and approved by Congress, appears to attempt to meet the challenge posed by the objections in the past to fairness in the

sentencing process by making the summary of factual information determined to be confidential obligatory on the trial judge if such information is requested by the defendant. Although this amendment to Rule 32 stops short of the right of confrontation at sentencing, it appears that that may be the next step. An excellent article on this subject which traces the difficulty the courts have had with an unbridled discretion of the sentencing judge is found in 8 *Cumberland Law Review* 403, by Paul Taparauskas, An Argument For Confrontation At Sentencing: Bringing The Offender Into The Sentencing Process.

The Supreme Court has denounced such an uncontrolled and uninformed discretion on the part of the sentencing judge in its landmark decisions of *Townsend* v. *Burke*, 334 U.S. 736, 68 S.Ct. 1252 (1948) and *United States* v. *Tucker*, 404 U.S. 443, 92 S.Ct. 589 (1971). These decisions have been followed by the Fifth Circuit Court of Appeals in *United States* v. *Murphy*, 497 F.2d 126 (5 Cir. 1974), *Shelton* v. *United States*, 497 F.2d 156 (5 Cir. 1973), and *United States* v. *Espinoza*, 481 F.2d 553 (5 Cir. 1973). In *Townsend*, supra, the Supreme Court has made it clear that a sentence based on false information cannot stand. As was said in *United States* v. *Weston*, 448 F.2d 626 (9 Cir. 1971), a decision by the same Court of Appeals which allowed post-conviction relief that was upheld by the Supreme Court in *Tucker*, supra, weight given to an improper factor in imposing sentence is reviewable by appellate courts. That decision and the Supreme Court decision in *Tucker*, supra, came prior to the amendment to Rule 32 in 1975. It is submitted that the amendment to the rule to provide for at least a "summary of

facts" which have been withheld by a trial judge from the accused was a carefully reasoned effort to insure that an offender's sentence was based on only reliable, probative, and trustworthy information. Rule 32(c)(3)(B) also reflects the view approved in *ABA Project On Minimum Standards For Criminal Justice*, Sentencing Alternatives and Procedures, Sec. 4.4(a) and (b).

Essentially, what the Court of Appeals is doing in the case at bar in authorizing the trial judge to continue to refuse to summarize facts considered to be confidential and not subject to full disclosure, is vesting discretion in the trial judge where the rule itself makes such a summary non-discretionary. Consequently, when Petitioner is resentenced before the trial court, we are likely to be faced with the same problem and have to again appeal the same issue to the Court of Appeals. At present, we do not have any idea whether the information, which the court has withheld and may withhold on resentencing, is conduct which is criminal in nature and, if so, the factual basis for believing it. The only time and place to test the accuracy, truth and validity of such information would be the proceedings on resentencing. If discretion is lodged in the trial court to deny a summary of facts on the confidential portion of the presentence report relied on for sentencing, Petitioner will be frustrated in his effort to present information in mitigation of punishment and in making any informed response at the only time he is afforded an opportunity to do so. This constitutes a denial of the process due under Rule 32 and violates Petitioner's rights under the due process clause of the Fifth Amendment.

This is a case of first impression and the only other reported decision coming to grips with the exact question presented for review herein is a district court decision, *United States* v. *Long*, 411 F. Supp. 1203 (E.D. Mich., 1976).

The Court of Appeals having stayed the issuance of the mandate in this cause is perhaps awaiting the decision of the Supreme Court on this very crucial question which is likely to have a significant impact on the sentencing procedures now employed in federal courts.[8] Accordingly, it is respectfully submitted that the Supreme Court has before it for review an important question of federal law that has not been, but should be, decided by this Court. Rule 19, Supreme Court Rules, supra. If the Supreme Court denies review of the issues presented on the affirmance of Petitioner's conviction, the appropriate alternative relief on the questions embracing the discretion of the trial judge on resentencing is to direct the Court of Appeals to modify its instructions to the judge so as to clarify his duty to make a non-discretionary summary of facts on which he relies for resentencing Petitioner.

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8 Fifth Circuit Local Rule 15 reads in pertinent part as follows:
"STAY OR RECALL OF MANDATE
A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith . . ."

CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above Petition for Certiorari have been served on Hon. Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; and one copy has been served on Hon. Edward B. McDonough, U.S. Attorney, P.O. Box 61129, Houston, Texas 77208, by Air Mail, postage prepaid, this ____ day of April, 1978.

Thomas D. McDowell

APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

versus

Gary WOODY,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

versus

Blanchard L. SAVANT,
Defendant-Appellant.

Nos. 77-5181, 77-5292.

United States Court of Appeals,
Fifth Circuit.

Feb. 17, 1978.

Appeals from the United States District Court for the Southern District of Texas.

Before GOLDBERG, AINSWORTH and FAY, Circuit Judges.

FAY, Circuit Judge:

The trial judges in the above-styled cases relied upon undisclosed information contained in presentence investigation reports in imposing sentence. These cases involve the common issue of whether, under the facts and circumstances of each case, the summary of the undisclosed information provided to the defendant pursuant to Rule 32(c)(3)(B) of the Federal Rules of Criminal Procedure was sufficient.[1] The appellant in No. 77-5181, Gary Woody, also contests the validity of a search of his car conducted by border patrol agents approximately two miles north of the permanent checkpoint near Falfurrias, Texas. We have concluded that the search was lawful and affirm

1 Rule 32(c)(3) of the Federal Rules of Criminal Procedure provides in pertinent part:

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

the conviction of the defendant Woody. We further conclude, however, that the sentences imposed upon the defendants Woody and Savant must be vacated and the cases remanded for further proceedings and resentencing consistent with this opinion.

I. FACTS

A. The facts in Case No. 77-5181, considered in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), indicate that on December 8, 1975, the defendant, Gary Woody, stopped his vehicle at the permanent Border Patrol checkpoint located on U.S. Highway 83 approximately seven miles south of Falfurrias, Texas.[2] As the Border Patrol agent approached the vehicle, Woody partially rolled down the window. While in the process of questioning the defendant concerning his citizenship, the agent detected the odor of marijuana emanating from the defendant's vehicle. The agent then instructed the defendant to open his trunk. The defendant responded by speeding away. After a high-speed chase covering approximately two or three miles, the defendant was apprehended and his vehicle was searched. A search of the trunk revealed a large quantity of marijuana. The defendant was subsequently convicted of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). At the trial the agent who made the initial checkpoint stop testified on direct examination that on many prior occasions he had had the oppor-

2 Falfurrias, Texas, is approximately seventy-seven highway miles from the most direct point on the border between the United States and Mexico.

tunity to detect the odor of marijuana. On cross-examination the agent further testified that marijuana smells like marijuana. Counsel for the defendant moved to strike the testimony of the agent on the ground that the evidence failed to establish that the agent was qualified as an expert in the detection of marijuana by smell. The court denied the defendant's motion to strike, and subsequently found the defendant guilty of the offense charged in the indictment.

Prior to sentencing, the defendant's counsel was permitted to read the presentence investigation report, excluding certain material kept secret pursuant to Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure. The portion of the report disclosed to the defendant's attorney contained a summary of the undisclosed material.

B. The defendant in Case No. 77-5292, Blanchard L. Savant, entered a plea of guilty to the charge of unlawful possession of an unregistered firearm in violation of 26 U.S.C. §§ 5861(d) and 5871. Prior to sentencing, the trial judge ruled that a portion of the presentence investigation report would not be disclosed pursuant to Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure. The trial judge did permit the defendant's attorney to inspect the remaining portion of the report and provided a summary of the information contained in the undisclosed segment of the presentence investigation report as required by subsection (c)(3)(B) of Rule 32. This defendant's contentions on appeal deal solely with the degree of disclosure permitted by the trial judge.

II. MERITS

A. The Automobile Search

The defendant Woody contends that the search of his automobile by the border patrol agent was conducted in violation of the Fourth Amendment to the United States Constitution because the agent lacked probable cause to effect such a search. The defendant argues that the government failed to establish that the agent possessed the superior skill or knowledge required to detect the odor of marijuana. Specifically, the defendant contends that the trial court committed reversible error in not excluding the testimony of the agent who detected the odor of marijuana because the agent failed to adequately describe the odor or enumerate the qualitative basis of his conclusion that the odor which he detected at the time of the stop was indeed the odor of marijuana.

At the outset, we note that the government has not contended in brief or in oral argument that the permanent checkpoint[3] located approximately seven miles south of Falfurrias, Texas, is the functional equivalent of the border. Of course, if it were established that the permanent checkpoint in question is the functional equivalent,[4] the defendant's automobile

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3 The record in this case, as well as prior cases in this Circuit involving the checkpoint seven miles south of Falfurrias, support our conclusion that this checkpoint is indeed a permanent checkpoint. E. g., *United States v. Andrade*, 545 F.2d 1032 (5th Cir. 1977); *United States v. McCrary*, 543 F.2d 554 (5th Cir. 1976); *United States v. Garza*, 539 F.2d 381, 382 (5th Cir. 1976).

4 *See United States v. Alvarez-Gonzalez*, 542 F.2d 226 (5th Cir. 1976), for a discussion of the criteria to be considered in determining functional equivalency.

could be searched without probable cause.[5]

It is settled that Border Patrol agents may stop vehicles at permanent checkpoints for the purpose of investigating the citizenship of the occupants. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *United States v. Andrade*, 545 F.2d 1032 (5th Cir. 1977). However, in order to conduct a search of the vehicle at the permanent checkpoint, probable cause justifying the search must exist. *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 46 L.Ed.2d 623 (1975).

The defendant's contention that probable cause to search his automobile was lacking in the case at bar is belied by recent decisions of this court. The case of *United States v. Andrade*, 545 F.2d 1032 (5th Cir. 1977) is directly on point. In *Andrade* we succinctly held that:

> The odor of marihuana emanating from appellant's vehicle gave the officer probable cause to detain appellant and search his car. *United States v. McCrary, supra; United States v. Kidd*, 5 Cir. 1976, 540 F.2d 210; *United States v. Garza, supra; United States v. Torres*, 5 Cir. 1976, 537 F.2d 1299.

545 F.2d at 1033.

In *United States v. Arrasmith*, 557 F.2d 1093 (5th Cir. 1977), this court rejected the defendant's contention

5 *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-273, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); *United States v. Wilson*, 553 F.2d 896 (5th Cir. 1977); *See also* 8 U.S.C. § 1357(a)(3).

that the district court committed error by considering the testimony of the border patrol agent that in his opinion the odor emanating from the vehicle was the odor of marijuana. *Arrasmith* recognizes that the trial judge possesses broad discretion in determining whether to permit a witness to testify that something smells like marijuana or whether to require further description of the precise odor. As we recognized in *Arrasmith:*

> But triers of fact are also free to employ their common sense and to take into account the lessons of common, ordinary experience. The district court did not take improper judicial notice by recognizing that odors are difficult of precise description and by accepting the agent's testimony that marijuana smelled like marijuana.

557 F.2d at 1094, 1095.

In the case at bar, as in *Arrasmith*, there is testimony in the record that the agent had smelled marijuana on many occasions. The district judge's denial of the defendant's motion to strike the testimony of the border patrol agent did not constitute an abuse of discretion.[6] Accordingly, the conviction of the defendant, Gary Woody, is affirmed.

6 Furthermore, assuming that the agent's testimony concerning the smelling of marijuana should not have been considered by the trial judge in assessing probable cause, we note, without deciding, that the defendant's conduct in speeding away after being requested to open his trunk may be deemed sufficient to satisfy the probable cause requirement. *See, United States v. Dimas*, 537 F.2d 1301 (5th Cir. 1976), *cert. denied* 429 U.S. 1047, 97 S.Ct. 755, 50 L.Ed.2d 762 (1977).

Rule 32(c) has historically been interpreted to place much discretion in the hands of the trial judge regarding the extent to which the defendant is to be apprised of the contents of the presentence investigation report.[8] Prior to the 1966 amendment of Rule 32,[9] the rule was silent concerning the disclosure of the contents of the presentence investigation reports and was accordingly applied in a diverse manner. Some federal judges followed a practice of denying disclosure altogether, some judges provided excerpts of the reports, while others provided full disclosure.[10]

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8 At the outset we note that the trial court may rely upon undisclosed information contained in a presentence investigation report in imposing sentence without abridging constitutional protections. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). The rule is different, however, in cases involving the imposition of the death penalty. *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Of course, in federal cases, Rule 32(c)(3)(B) mandates summarization of undisclosed portions of the presentence report relied upon in imposing sentence, whether or not the offense is capital in nature.

9 Prior to the 1966 Amendment, Rule 32(c) provided in pertinent part:

> (c) Presentence Investigation
>
> (1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> (2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

10 For example, in *United States v. Durham*, 181 F.Supp. 503 (D.D.C.1960), *cert. denied*, 364 U.S. 854, 81 S.Ct. 83, 5 L.Ed.2d 77 (1960), the court held that presentence investigation reports are strictly confidential and not to be disclosed to the defendant. *See also, Hoover v. United States*, 268 F.2d 787, 790 (10th Cir. 1959);

The disparate policies practiced by the federal courts concerning disclosure of the presentence investigation report led to the expression of opposing views concerning the propriety of disclosure. The primary argument in favor of disclosure is that disclosure is necessary to assure that the trial judge does not rely upon erroneous or inaccurate information in imposing sentence. *See United States v. Long*, 411 F.Supp. 1203 (E.D.Mich. 1976).[11] Prestigious professional organizations, such as the American Law Institute[12] and the National Council on Crime and Delinquency,[13] have strongly recommended that the

Powers v. United States, 325 F.2d 666, 667 (1st Cir. 1963). Other courts disclosed the contents of the presentence investigation report and permitted comment thereon. *See, Shields v. United States*, 237 F.Supp. 660 (D.C. Minn.1965); *Smith v. United States*, 223 F.2d 750, 754 (5th Cir. 1955), rev'd on other grounds, 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959).

A survey conducted in 1963 by the Junior Bar Section of the Bar Association of the District of Columbia revealed the diverse treatment of the contents of presentence investigation reports. Questionnaires were sent to 294 active district judges and 51 senior district judges. The questionnaire contained the following question: "Is it the practice of your Court to divulge any information contained in presentence reports to defense counsel?" Of the 157 responses received, 63 (43%) stated that the reports were exhibited to defense counsel and 83 (57%) stated that disclosure was refused. The responses also indicated that 11 judges exhibited the entire report to counsel, 19 judges provided excerpts of the reports to counsel, and 13 judges provided summaries. Junior Bar Section of the District of Columbia, Discovery in Federal Criminal Cases, 33 F.R.D. 101, 125 (1963).

11 The primary arguments against disclosure are that (1) informational sources will refuse to cooperate if the cloak of confidentiality is removed (2) sentencing will be delayed due to the need to resolve controversies which will arise concerning the contents of the reports (3) rehabilitative efforts will be hampered. *United States v. Long*, 411 F.Supp. 1203 (E.D.Mich. 1976).

12 ALI Model Penal Code § 7.07(5) (1962).

13 National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963).

federal courts adopt a policy of disclosure.[14] The controversy led to the amendment of Rule 32(c) in 1966, in which the following sentences were added to Rule 32(c)(2):

> The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.[15]

In providing that the court "may" disclose the contents of the presentence investigation report, the 1966 Amendment codified the existing practice of vesting discretionary power in the trial court to determine whether disclosure should be permitted.[16] Although

14 More recently, the American Bar Association has publicly endorsed a policy of disclosure. ABA Standards Relating to Sentencing Alternatives and Procedure § 4.4 (Approved Draft, 1968).

15 An earlier proposal provided for mandatory disclosure of a summary of the report. Advisory Committee on Criminal Rules, Preliminary Draft of Proposed Amendment, 31 F.R.D. 665, 686 (1962). A subsequent proposal would have required mandatory disclosure of the report, absent the identification of confidential sources. Advisory Committee on Criminal Rules, Second Preliminary Draft of Proposed Amendments, 34 F.R.D. 411, 438 (1964).

16 In his treatise on criminal procedure, Professor Wright makes the following observation concerning the effect of the 1966 Amendment:

> Thus as finally adopted the rule is discretionary with the trial court.[60] Since there is not the slightest doubt that the courts already had such discretion, and a substantial minority of judges were already permitting disclosure, the amendment makes no change in the law.

disclosure was not made mandatory, the Advisory Committee's note reflects a policy determination that disclosure is to be encouraged. The note states:

> It is hoped that courts will make increasing use of their discretion to disclose so that the defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences.

Fed.R.Crim.P. 32(c)(2), Advisory Committee Note (1966).

That the 1966 Amendment did not fully effectuate the intent of the draftsmen is apparent from an examination of the practice in the Fourth Circuit following the Amendment.[17] In *Baker v. United States*, 388 F.2d 931 (4th Cir. 1968), the court noted the continued disparity of practice concerning the disclosure of presentence investigation reports pursuant to Rule 32(c)(2).

By its terms, the rule is permissive as to

Wright, Federal Practice and Procedure: Criminal § 524.

For a sampling of cases interpreting Rule 32(c)(2), as amended in 1966, to provide for discretionary disclosure see *United States v. Murphy*, 497 F.2d 126 (5th Cir. 1974); *United States v. Schrenzel*, 462 F.2d 765 (8th Cir. 1972), *cert. denied*, 409 U.S. 984, 93 S.Ct. 325, 34 L.Ed.2d 248 (1972); *United States v. McKinney*, 450 F.2d 943 (4th Cir. 1971); *Fernandez v. Meier*, 432 F.2d 426 (9th Cir. 1970); *United States v. Virga*, 426 F.2d 1320 (2nd Cir. 1970), *cert. denied*, 402 U.S. 930, 91 S.Ct. 1530, 28 L.Ed.2d 864 (1971); *United States v. Talk*, 418 F.2d 53 (10th Cir. 1969).

17 Additionally, as late as 1974 it was the policy of at least one district court in the Seventh Circuit to deny disclosure of the presentence investigation report as a matter of course. *See, United States v. Miller*, 495 F.2d 362 (7th Cir. 1974) where the Seventh Circuit struck down such policy.

> whether the court discloses *all* or *part* of the material contained in the report of presentence investigation. We are mindful that in the district courts in this Circuit there is wide variation in the practice concerning disclosure. In one district disclosure of all is the rule, withholding of part is the exception. In other districts, including at least one where disclosure of the report has resulted in improper pressures being visited on confidential informants, with the consequent risk that limitation of the sources of information and effectiveness of the report will ensue, the practice is to treat the presentence report as a confidential document solely for consideration by the court.

388 F.2d at 933.

Rule 32(c) was amended again in 1975 with the intent to further promote the practice of disclosing the presentence investigation report, or portions thereof, to the defendant, except under circumstances enumerated in the Rule.[18] The Rule, in mandatory lan-

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18 Rule 32(c) was amended in pertinent part to provide as follows:

> (3) Disclosure
>
> (A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and

guage, now provides that the defendant or his counsel is to be permitted to read the presentence investigation report, exclusive of any recommendation as to sentence, unless the court determines that (1) the report contains diagnostic material which, if disclosed, might seriously disrupt rehabilitative efforts, or (2) the report contains sources of information obtained upon a promise of confidentiality, or (3) the report contains any other information which, if disclosed, might result in harm to the defendant or to others. In the event information is withheld pursuant to one of the above listed exclusions and the trial judge relies upon such information in the imposition of sentence, the judge is to provide an oral or written summary of such factual information to the defendant or to his counsel.

The policy underlying the 1975 Amendment of Rule 32(c) is that disclosure will help to assure the accuracy of sentencing information.[19] The 1975 Amendment,

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the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

19 The Advisory Committee stated in pertinent part:

The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is dis-

while promoting disclosure, balances competing interests by providing that full disclosure need not be made under the compelling circumstances enumerated above. Rather, the Rule expressly provides for summarization of the sensitive information relied upon in imposing sentence. The Rule is silent, however, concerning the precise issue with which we are confronted. How precise must the summary be? Nor are we guided by decisions of this Circuit.[20] As the issue before the Court appears to be one of first impression, we shall endeavor to set forth practical guidelines governing the application of Rule 32(c) while not transgressing the narrow issue before us.

In determining whether, under the facts and circumstances of the cases before this court, the summaries provided to the defendants were legally sufficient, we must balance the competing policies underlying Rule 32(c)(2) and (3) of the Federal Rules of Criminal Procedure. We deal here with a very sensitive area of the law in which the rights of the defen-

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closure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the court orders a full hearing.

Fed.R.Crim.P. 32(c), Advisory Committee Note (1974); *See also United States v. Long*, 411 F.Supp. 1203 (E.D.Mich.1976).

20 In fact, the only case our research revealed dealing with this specific issue was *United States v. Long*, 411 F.Supp. 1203 (E.D.Mich. 1976), in which Judge Joiner tackled the very issue before this Court head on.

dant may often conflict with the need to safeguard confidentiality and to avoid the attendant risk of harm to others which may be involved.

The starting point of our analysis is that the defendant has a constitutional right to be sentenced on the basis of accurate information. *See Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948); *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). *See also, United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973). With this premise in mind, we turn directly to the issue of the meaning of the "summary of factual information" provided for in Rule 32(c)(3)(B) of the Federal Rules of Criminal Procedure. We do not purport to set forth an inflexible rule which can be mechanically applied to the facts of all cases which may arise. Rather, we intend to breathe some life into the meaning of "summary of factual information" so that the intent of the draftsmen of Rule 32(c)(3) — that the defendant have an opportunity to rebut or clarify information relied upon in imposing sentence — can be effectuated.

In order to afford the defendant a fair opportunity to correct or rebut erroneous information contained in the undisclosed portion of the presentence investigation report, the summary should, in a manner as specific as the facts permit, inform the defendant of the nature of the information. For example, the summary should relate whether the information pertains to reputation or to the existence of evidence of more concrete behavioral characteristics or participation in

criminal acts.[21] If the information does pertain to reputation, the defendant should be advised as to whether the reputation is related to employment or to the defendant's personal relationships. Additionally, if the facts indicate that the precise reputation can be revealed without the risk of harm or breach of confidentiality, it should be the policy of the court to tailor the summary accordingly. Generally, the defendant should be advised of the precise nature of any behavioral characteristics or instances of illegal conduct detailed in the report, unless to do so would breach the protective provisions of Rule 32(c)(3)(A). We reiterate that we are not espousing iron clad rules to be followed by the trial court. We only cite specific examples to illustrate our holding that the summary should be as specific as the facts and circumstances of the case permit. We are certain a perfunctory statement paraphrasing the language of the rule is not a legally sufficient summary. The trial court must, on a case by case basis, balance the policy of making disclosure as specific as possible with the need to preserve confidentiality. Although we do not adopt the distinction drawn by the court in *United States v. Long*, 411 F.Supp. 1203, 1207 (E.D.Mich.1976), that Rule 32(c)(3)(B) "requires only a 'summary of factual infor-

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21 For example, in *Shelton v. United States*, 497 F.2d 156 (5th Cir. 1974), the trial court clearly sought to inform the defendant of the nature of the allegations. The court summarized the undisclosed material as pertaining to:

> [C]onfidential information which I will not permit counsel to see, not from the probation officer but from persons within the services of the United States which is sufficiently probative to indicate that Shelton, in fact, was the middle of a drug operation or very probably substantially involved in a drug operation and that's where his money came from.

497 F.2d at 158.

mation,' not a 'factual summary of information,' " we see merit in the court's conclusion that:

> In some cases, because of the need to protect sources, the defendant, third persons, or the program of rehabilitation, the summary may be very general and of little help to the defendant in either providing additional information or in commenting on the substance of the report or challenging its factual accuracy.

Id.

While accepting the above conclusion, we nevertheless envision such practice to be the exception and certainly not the rule.

We recognize that the approach we sanction necessarily vests much discretion and reposes much confidence in the trial judge. This discretion, however, will not go unchecked. Prospectively, the trial judge should state on the record whether he is relying on the undisclosed information. Of course, if the trial judge does not rely upon the undisclosed information in imposing sentence, Rule 32(c)(3)(B) does not require summarization. If the judge states on the record that he is placing reliance on the undisclosed material, he should submit the undisclosed material in a sealed envelope to the appellate court as part of the record on appeal, and should include in the sealed materials a statement stating in specific terms the reasons supporting his decision not to fully disclose and the factors supporting the particular summary provided to the defendant. We in no way imply that the appellate

court should second guess the trial judge as to the propriety of providing summarization rather than full disclosure. We only insist that the record on appeal be complete so that we can determine whether the facts of the particular case demonstrate an abuse of discretion in either (1) the decision not to disclose but to provide summarization or (2) the adequacy of summarization.

We now turn to the two cases before this court to determine whether, under the facts and circumstances of each case, the trial court abused its discretion in the manner the undisclosed portion of the presentence report was summarized.

In No. 77-5181, *United States v. Woody*, the court summarized the information contained on the undisclosed portion as follows:

> This information is summarized as being in reference to the defendant's reputation in his home community and his reputation among law enforcement officials there. The report also contains information as to his reputation with regard to past and present employment.

Although the summary geographically limits the scope of the reputation to the defendant's home community, and the defendant can safely assume that the reputation is bad because of nondisclosure, the summary fails to give any notice of the nature of the reputation or the underlying allegations supporting the reputation. The segment of the report which was disclosed to Woody concludes that:

> . . . The specific exclusions are justified on the basis that information was received from sources upon a promise of confidentiality. Diagnostic opinion was received which might seriously disrupt a program of rehabilitation or might result in harm, physical or otherwise, to the defendant or other persons.

It may well be that more detailed summarization in this case would disrupt rehabilitation, reveal confidential sources, or even expose the defendant or others to possible physical harm. The record, however, contains no indication of why more detailed summarization would lead to one or more of these deleterious conditions.[22] Accordingly, we vacate the sentence and remand case No. 77-5181 to the trial court for further proceedings consistent with this opinion. For us to do otherwise would mean that we would be doing no more than paying lip service to the right of the defendant to rebut possibly erroneous information without providing a viable opportunity for him to do so. If the trial judge on remand concludes that more detailed summarization is inappropriate, he should document the record, as we have outlined above, while steadfastly preserving the confidentiality of the information.

In No. 77-5292, *United States v. Savant*, the disclosed

22 We have already suggested that one possible method available to the trial court to support its exercise of discretion would be to submit in a sealed envelope, accompanying the undisclosed material, a brief statement specifically stating the reasons why more detailed disclosure would either seriously disrupt a program of rehabilitation, reveal sources of information obtained upon a promise of confidentiality, or which might otherwise cause harm to the defendant or third persons.

portion of the presentence investigation report concludes that certain information should not be disclosed to the defendant because the information was received from confidential sources and disclosure might result in harm to the defendant or to other persons. The undisclosed information was summarized as follows:

> This information is summarized as being in reference to the defendant's reputation among law enforcement agencies, interpersonal family relationships and employment activities.

Once again, the issue arises as to whether this summary sufficiently affords the defendant the opportunity to rebut any erroneous information which may appear in the undisclosed portion of the report. Because we have concluded that this case must be remanded to the trial court in any event, we only note in passing that the summary appears seriously deficient in advising the defendant of the nature of the reputation material. On the other hand, we are also cognizant of facts in the record which might indicate that more detailed summarization of the matters alluded to in the summary may not be appropriate in this case.[23]

More importantly, our study of the undisclosed portion of the presentence report indicates that this por-

23 This issue should be considered by the trial court on remand. If the court determines that more detailed disclosure is inappropriate, the record should be documented accordingly, in a sealed document setting forth the specific reasons why a more detailed summary would be deleterious. This documentation should, of course, be kept confidential.

tion contains material of a highly prejudicial nature which is not alluded to in the summary provided to the defendant. We can only assume that the trial court relied upon this information in imposing sentence, and thus is obligated to provide a summary thereof, because the record reveals that the only information contained in the undisclosed portion which the trial court disregarded in imposing sentence dealt with the defendant's reputation among various law enforcement officials.[24] The trial court therefore erred in not summarizing undisclosed information relied upon in imposing sentence as mandated by Rule 32(c)(3)(B) of the Federal Rules of Criminal Procedure.[25] We, therefore, vacate the sentence imposed in this case and remand the case to the trial court for further proceedings consistent with this opinion.

We also note that on remand the district court in imposing sentence should rely only on information contained in the undisclosed portion of the presentence report which is found to be "of a highly reliable and

24 The record reveals that during the sentencing hearing conducted on April 26, 1977, the defendant's attorney specifically objected to the court's consideration of the defendant's reputation among law enforcement officials in Beaumont, Texas, and in Jefferson County, Texas. In response, the trial judge stated:

> I understand. I feel compelled, though, to remain firm on what I have said about it. I will tell you, there is not — there is some of that in there, as I said, reputation among other law enforcement agencies. It is there. I cannot say I am not relying on it, but I think I can say I am not relying on that part of it. I can assure you of that.

25 Of course, we can not be more specific in describing this information at this time or we would run afoul of the protective provisions of Rule 32(c). We can only remand this issue to the trial court for further consideration, retaining further power of appellate review.

probative character within the meaning of *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971)." *Shelton v. United States*, 497 F.2d 156 (5th Cir. 1974). In *Weston* the court held that ". . . [T]he District Court may not rely upon the information contained in the presentence report unless it is amplified by information such as to be persuasive of the validity of the charge there made."[26]

In conclusion, the conviction of the defendant Woody is hereby affirmed, but the sentence is vacated and the case remanded for further proceedings consistent with this opinion. The sentence imposed upon the defendant Savant is likewise vacated and the case hereby remanded for further proceedings.

Vacated and remanded for resentencing.

26 448 F.2d at 634.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5181

D. C. Docket No. CR 76-C-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GARY WOODY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG, AINSWORTH and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed; the sentence is vacated and that this cause be, and the same is hereby remanded to the said District Court for resentencing in accordance with the opinion of this Court.

February 17, 1978

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5181

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GARY WOODY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(March 20, 1978)

Before GOLDBERG, AINSWORTH and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ PETER T. FAY
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5181

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GARY WOODY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ORDER:

The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April 19, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy

of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ PETER T. FAY
UNITED STATES CIRCUIT
JUDGE